

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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DISTRICT COURT
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DISTRICT OF UTAH

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DANIEL JOSEPH PALERMO,

BY: _____
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) Case No. 2:03CV00742

Plaintiff,)

vs.)

MEMORANDUM DECISION
AND ORDER

UNITED STATES OF AMERICA,)

Defendant.)

* * * * *

I. INTRODUCTION

On August 29, 2002, Petitioner Daniel Joseph Palermo ("Palermo") pled guilty to possession of an unregistered sawed-off shotgun. He was sentenced on November 11, 2002, to 64 months incarceration, plus a \$500 fine and 36 months of supervised release. On July 11, 2003, Palermo filed a "MOTION FOR SUMMARY IMPOSITION OF NEW SENTENCING JUDGMENT", which the court construed as being filed pursuant to 28 U.S.C. § 2255. The United States, at the request of the court, filed a response to the motion on October 23, 2003. By his petition, Palermo contends that he was denied the effective assistance of counsel because his counsel failed to file a notice of appeal.

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The relevant facts reflect the following. On April 24, 2002, Palermo was charged in a two-count indictment with possession of an unregistered sawed-off shotgun and possession of methamphetamine with intent to distribute. On August 29, 2003, Palermo pled guilty to count one of the indictment charging possession of an unregistered sawed-off shotgun. In the plea agreement he stipulated that "the § 2K2.1(b)(5) four level enhancement applies to the defendant's conduct". (Statement in Advance of Plea at ¶ 13) The United States in turn agreed to recommend a full reduction for acceptance of responsibility, recommend a sentence at the low end of the guideline range, recommend drug treatment, and dismiss count two of the indictment.

On November 4, 2002, Palermo filed a pro se motion to withdraw his plea and replace counsel, contending, among other things, that the pre-sentence report erroneously included the imposition of a 4 level enhancement. This was the same 4 level enhancement to which he had earlier stipulated in the Statement in Advance of Plea. On November 7, 2002, the date set for sentencing, Palermo, after further discussion, withdrew his motion to withdraw guilty plea and to replace counsel. His motion for a two point downward departure was denied and a sentence of 64 months imprisonment was

imposed. No direct appeal was taken. On July 11, 2002, Palermo filed the instant petition.

II. DISCUSSION

Palermo contends that he was denied his Sixth Amendment right to the effective assistance of counsel because his counsel failed to file a notice of appeal on his behalf. To prevail on his claim of ineffective assistance of counsel, Palermo must show (1) that his counsel's performance "fell below an objective standard of reasonableness" and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct" id. at 690, and "[j]udicial scrutiny of counsel's performance must be highly deferential". Id. at 689. When the issue involves counsel's alleged deficient performance for failure to file a notice of appeal, the Supreme Court instructs as follows.

[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must

take into account all the information counsel knew or should have known. ... Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000).

Palermo and his counsel dispute what occurred after sentencing. Palermo states that he responded "yes" when asked by his counsel if he wanted to appeal. On the other hand, defense counsel states that after sentencing, he advised Palermo of his right to appeal the sentence and Palermo indicated he did not want to appeal.

Although the court cannot judge the credibility of either Palermo or his counsel from their written statements, this matter can be resolved short of an evidentiary hearing. As the Court noted in Flores-Ortega, 528 U.S. at 480, there are a number of factors relevant to the inquiry of whether a defendant demonstrated

he was interested in filing an appeal. Here Palermo entered a guilty plea, which not only narrowed the scope of appealable issues, but also reflects a desire to end judicial proceedings. He acknowledged that there would be "no appellate review of any lawful sentence imposed under a plea of guilty." (Statement in Advance of Plea at ¶ 9). Additionally, Palermo received the sentence for which he bargained. Before he entered his guilty plea Palermo was advised by defense counsel that the United States would seek a sentence enhancement because of the presence of methamphetamine on his person when he was carrying the shotgun. He also was informed of the likely sentencing range. In a letter to Palermo dated August 12, 2002, defense counsel advised Palermo of several sentencing scenarios.

I am writing to correct a mis-interpretation of the likely sentencing outcome you are facing in the pending federal case. The initial figures you were provided neglected to account for the methamphetamine the government alleges was found in your coat. The prosecutor indicated that he wanted you to plead to the gun charge, but the meth will be considered by the court as relevant conduct and will result in an increase of 4 levels to your base offense level.

Therefore, with a criminal history category of V, the likely outcome will be a guideline range of 77-96 months if you were convicted at trial and 57-71 months if you plead guilty. With a criminal history category of VI, you face a range of 84-105 months and 63-78 months respectively.

(Response of the United States, Ex. C; see also Sisneros Aff.,

¶ 5). Palermo's sentence of 64 months is at the low end of the guidelines and within the range predicted by defense counsel in advance of Palermo's change of plea. As yet another indication of his desire to end legal proceedings, on the day of the sentencing hearing, Palermo withdrew his pro se motion to withdraw his plea and to replace counsel. The court notes that the withdrawn motion raised the same or similar claims Palermo now seeks to appeal. Finally, the record reflects that Palermo was advised of his right to appeal in the Statement in Advance of Plea. He acknowledged that he understood that right. He was again advised of his right to appeal by the court at sentencing. His failure to raise the issue of appeal for almost nine months after sentencing weighs against his present position and suggests that his current dissatisfaction is merely an after thought.


The court concludes that the foregoing circumstances corroborate defense counsel's account of the facts. Palermo having failed to establish that defense counsel's performance fell below an objective standard of reasonableness, the court agrees with the government that there is no need to determine prejudice.

III. CONCLUSION

For the reasons stated, **IT IS HEREBY ORDERED** that Petitioner's motion for imposition of new sentence pursuant to 28 U.S.C. § 2255 is **DISMISSED**. **IT IS FURTHER ORDERED** that all other pending motions are **DENIED** as either moot or without merit.

DATED this 13th day of January, 200~~8~~⁴.

BY THE COURT:



DAVID SAM
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
District of Utah
January 14, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00742

True and correct copies of the attached were either mailed, faxed or e-mailed
by the clerk to the following:

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